86-348

No.

Supreme Court, U.S.
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CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

ASSIGNED CONTAINER SHIP CLAIMS, INC.,
Petitioner,

vs.

AMERICAN PRESIDENT LINES, LTD., SEA-LAND SERVICE, INC., AND UNITED STATES LINES, INC.,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOSEPH M. ALIOTO
ALIOTO & ALIOTO
650 California Street
23rd Floor
San Francisco, CA 94108
(415) 434-2100
Attorneys for Petitioner

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

QUESTIONS PRESENTED

1. Whether incidental resort to a government agency is sufficient to clothe in Noerr-Pennington immunity an agreement among competitors to let one of their number be the sole bidder in an auction of ocean-going vessels.

2. Whether 46 U.S.C. 814 providing for the filing of otherwise anticompetitive agreements with the Federal Maritime Commission is the exclusive antitrust immunity which Congress has provided for members of the shipping industry.

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OPINIONS BELOW

The opinion and judgment of the Court of Appeals in this case is reported at 784 F.2d 1420 (filed March 18, 1986) and at 1-1986 Trade Cases ¶ 67,008. The opinion and the order denying rehearing in the Court of Appeals are reprinted in the Appendix hereto. Also included in the Appendix hereto is a portion of the December 11, 1984 transcript of proceedings in this case before District Judge Charles Legge, in which Judge Legge announced from the bench his decision to grant summary judgment for respondents, and stated the reasons therefor. Judge Legge recused himself before signing the judgment, which was subsequently entered by Judge Thelton Henderson. Judge Henderson's order adopting Judge Legge's reasoning and entering judgment in favor of respondents is also reprinted in the Appendix.

JURISDICTIONAL STATEMENT

This petition is filed within 90 days of the Court of Appeals' denial of rehearing, which occurred on May 30, 1986. Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

Petitioner, a California corporation, filed this action as assignee of the trustee in bankruptcy for Pacific Far East Lines, Inc. [PFEL] which, prior to its 1978 adjudication as a bankrupt, owned and operated containerships in the Pacific trade, and as assignee of certain creditors holding maritime liens against PFEL containerships.

Respondents are American President Lines, Ltd., Sea-Land Service, Inc., and United States Lines, Inc. These corporations are the only United States flag containership operators in the Pacific Trade.

This is an antitrust case for damages (15 U.S.C. 1, 2, 15). In 1978 three of PFEL's ships were sold at auction. Respondent APL was the purchaser. The gravamen of this suit is petitioner's contention that the combined activities of respondents and the Federal Maritime Administration caused the auction price of the vessels to be far less than it otherwise would have been (i.e. $13 million per vessel instead of $25 million per vessel).

By 1978, 85% of the cargo moving in the Pacific-Far East trade was moving in containers [Hiltzheimer dep., pp. 28-29; Seaton, Ex. 5; Brennan dep., pp. 93-96; Kozlowski, Ex. 11]. The undisputed record in this case is that there was, in 1978 and 1979, a strong and growing market for U.S. flag container services on Trade Route 29 (Pacific Coast-Far East), and a strong and widely recognized demand for containerships—the only vessels suitable for operation in that trade.

In 1978 only five American flag steamship companies—APL, SEA-LAND, U.S. Lines, PFEL and States Steamship Co.—operated in the Pacific-Far East trade [Seaton dep. pp. 21-22; Seaton Ex. 5]. Three of those companies—APL, SEA-LAND, and U.S. Lines—operated in the Pacific-Far East trade

with containerships. [Seaton dep., pp. 23-25]. Two of the companies, PFEL and States, attempted to compete in the Pacific without containerships. Both failed.

Prior to 1979, Lykes Brothers Steamship Company, a New Orleans based company, did not operate in the Pacific-Far East trade—Trade Route 29. It operated on Trade Route 17—the trade moving from the Gulf of Mexico to the Far East. It wished to enter the Pacific-Far East trade, and, as seen, required containerships in order to do so.

Lykes did two things. It began to consider how it might obtain Trade Route 29 operating differential subsidy rights. Without such rights, Lykes was financially unable to operate in the Pacific. Also, Lykes began to see how it might best get itself the containerships needed to operate on that route—it had none, and its conventional bulk and barge-carrying vessels were simply not suitable for use in the Pacific [Hiltzheimer dep., pp. 49-73; Brennan dep., Exs. 6 and 12; Benedict decl., ¶ 15; McClean dep., pp. 8-9.].

In August, 1978, Lykes began to consider private purchase of one or more of the PFEL containerships then for sale. Thus, in August, 1978, the president of Lykes, J. Amoss, discussed a $25 million per vessel price with the PFEL trustee, and, while declining a present interest, told the trustee that Lykes could potentially be interested in acquiring containerships in the future. [Benedict decl., p. 7, ll. 16-26].

At about the same time, Lykes commenced negotiations for acquisition of States Steamship Company, the idea being that the Trade Route 29 subsidy rights possessed by States would, by virtue of such acquisition and upon the consent of the Maritime Administration, pass directly to Lykes without subjecting Lykes to harassment by APL, SEA-LAND or U.S. Lines. [Amoss dep., p. 45, l.21-p. 46, l.15; p. 70, l.25-p. 73, l.8; Merchant Marine Act, Section 608].

On December 29, 1978, MARAD authorized the grant of an operating differential subsidy for 20 years to Lykes and approved and authorized the execution of an agreement under which Lykes would acquire certain States vessels and trade routes. [Williams

dep., Ex. 17, p. 1]. Specifically, MARAD nad by December 29, 1978 reached an agreement with Lykes that Lykes could:

> "(1) acquire certain vessels previously owned and operated by States Steamship Company (States), (2) provide services on TR's 29 and 17 for which section 605(c) determinations have been made, and (3) employ certain of its other vessels on TR 29 and 17, and related matters, which, subject to all necessary approvals having been obtained or granted, when finalized, are intended to be included as an addendum to ODSA Contract No. MA/MSB—451. The provisions in this paragraph M are subject to confirmation by January 5, 1979, of agreement in principle between Lykes and States, acceptable to the Secretary, which would serve to effectuate the understandings set forth as to vessels . . . " [Hiltzheimer dep., Ex. 18, p. 10, ll. 1-11].

Lykes was ready to sail in the Pacific. All it needed now were containerships.

On Friday, January 12, 1979, APL filed a petition for reopening for purpose of reconsideration in Docket No. 451, the MARAD proceeding in which Lykes had acquired MARAD's approval for the acquisition of certain of States vessels and its Pacific trade routes. APL's petition constituted a broad-based attack on the terms to be included in Lykes' new 20 year subsidy contract.

> "[The] Lykes service . . . can readily be converted to a containership service, a conversion for which States had neither the desire nor the financial capacity. On its face, the [December 29, 1978] Broad understanding would allow Lykes to employ in the trans-Pacific service "not in excess of six conventional vessels" from its fleet. If this meant that Lykes could not without § 605(c) clearance acquire or build containerships to be used, directly or by transfer, in the trans-Pacific service, APL's concerns would be greatly reduced. We have been advised in informal conversations that both the Board and Lykes consider that Lykes would be free at its will to introduce containerships into the service." [Tavrow dep., Ex. 2, p. 8, § (d)].

Defendants conceded below that, as of January 12, 1979, Lykes had no containerships, and had not made any application for subsidized operation of containerships. Obviously no such non-existent application had been or could have been granted by MARAD. Indeed, Amoss testified that containerships and/or containers hadn't so much as been mentioned during his December 1978 conferences with Seaton, Bru and Sea-Land [Amoss dep., p. 165, l. 18-p. 166, l. 10; p. 167, ll. 11-19; p. 172, ll. 10-21; p. 175, l. 14-p. 176, l. 7]. What APL knew by January 12, 1979 was that MARAD had approved Lykes' acquisition from States of Trade Route 29 authority. It also knew that Lykes' subsidy rights on Trade Route 29 were limited to its present—non-containership—fleet and the States RO/RO vessels, and then only to the extent 605(c) determinations had previously been made [Hiltzheimer dep., Ex. 18, pp. 4-10]. But, more critically, APL knew that, once possessed of Trade Route 29 authority, Lykes would enter the market for containerships. Indeed, APL's own petition expresses the probability that Lykes would seek to acquire containerships and introduce those ships into the Pacific service [Tavrow dep., Ex. 2, p. 8, ¶ (d)]. And the PFEL containerships were for sale.

Amoss of Lykes telephoned Seaton of APL on January 12, 1979, immediately upon his receipt of APL's petition to reopen [Amoss dep., p. 199, ll. 12-22]. Amoss complained to Seaton about APL's petition. He promised Seaton that the "competition" between Lykes and APL would not be "intense." He told Seaton that Lykes would help APL out as time went by, and asked if something could be worked out to effect a withdrawal of APL's petition [Amoss dep., p. 200, ll. 12-18]. Seaton told Amoss that "maybe there is something we can do here," and advised that someone would be back in touch with Amoss [Amoss dep., p. 200, ll. 20-24]. APL's Kozlowski telephoned Amoss at Seaton's request during the evening hours of Saturday, January 13, 1979 [Amoss dep., p. 203, l. 4-p. 205, l. 8; Kozlowski dep. (3/2/84) p. 188, ll. 5-23]. Kozlowski asked Amoss to agree to not operate [i.e. acquire] containerships, and read Amoss a restriction which APL proposed to place on Lykes' ability to operate containerships [Kozlowski dep. (3/2/84), p. 178, l. 6-p. 179, l. 12; p. 180, ll. 2-13; p. 181, l. 27-p. 182, l. 3; p. 183, l. 19-p.

184, l. 6; p. 188, l. 21-p. 189, l. 6; Amoss dep., p. 203, l. 4-p. 205, l. 8]. Amoss accepted the restriction, and Kozlowski reported the agreement to Seaton [*Id.* at p. 179, ll. 13-23]. Amoss then told his lawyer, Kominers, to contact APL's lawyer, Gardner [Amoss dep., p. 205, ll. 11-14]. Kominers immediately phoned APL's Gardner and advised that Messrs. Amoss and Seaton had reached agreement on a restriction to be placed on Lykes' ability to operate containerships. Kominers took the position that both Sea-Land and U.S. Lines would have to consent to any deal which might be struck between APL and Lykes [Tavrow dep., Ex. 20, p. 2; Gardner dep., p. 71, l. 20-p. 73, l. 11]. Gardner and Kominers agreed to meet the next day to "work out the operative language" [Gardner dep., p. 79, l. 10-p. 80, l. 5]. APL's counsel next immediately contacted counsel for U.S. Lines. Thus, Gardner phoned R. Weil at home the evening of Saturday, January 13, 1979. [Weil dep., pp. 26-29].

On Sunday, January 14, 1979, Kominers' attorney and Gardner met privately at Gardner's home in Bethesda, Maryland [Amoss dep., p. 205, ll. 15-19; Kominers dep., Ex. 3; Kominers dep., p. 23, l. 4-p. 25, l. 15]. During the course of his Sunday meeting with Kominers, Gardner conferred by phone with R. Weil at least three times, and conferred by phone with Sea-Land's Shea on three separate occasions [Weil dep., Ex. 8; but see Weil Ex. 19]. As a result of the January 12-14, 1979 contacts and conferences between and among Lykes and respondents, Kominers and Gardner had, by 9:35 p.m. on Sunday, January 14, 1979, fashioned the following restriction to be placed on Lykes' ability to operate containerships:

> "Lykes shall not enter containerships into service whether directly or as top-offs, on Trade Route 29 or Trade Route 17 (Pacific), nor be required to replace existing vessels with containerships for such service, without prior notice and opportunity for hearing under § 605(c) of the Act. As used herein, a "containership" means a vessel with more than 500 TEU. This restriction shall terminate if the validity or binding effect of the provisions of this paragraph M is contested administratively or before a court." [Kominers dep., Ex. 3].

On January 15, 1979, APL's Gardner wrote to MARAD, with copies to Sea-Land, U.S. Lines, Lykes and States, and abruptly withdrew its January 12, 1979 petition to reopen upon condition that MARAD accept the weekend containership restriction previously agreed to among the lines [Tavrow dep., Ex. 4]. On January 22, 1979 Gardner wrote to Kominers and, with respect to the "termination" language included in the restriction which had been negotiated over the weekend, made the obvious point "[A]ny such condition would seem to position the Board [MARAD] as a passive pawn to private negotiations rather than as a government agency taking whatever action it considers to be right." Copies of Gardner's letter were sent to both Sea-Land and U.S. Lines [Tavrow dep., Ex. 20]. MARAD's formal "approval" and acceptance of the private pact was forthcoming on January 29, 1979 [Blocklin dep., Ex. 9, p. 2]

On January 29, 1979, H. Blocklin of Lykes and C. Caras of MARAD executed Addendum No. 1 to operating differential subsidy agreement, Contract No. MA/MSB-451. Article 3 of that Addendum incorporated the Lykes containership restriction which resulted from the January 12-14 negotiations [Blocklin dep., Ex. 9, p.2]. At that time Blocklin understood that APL and Sea-Land thought that Lykes might enter containerships into the Pacific trade [Blocklin dep., p. 96, l. 8-p. 97, l. 9; p. 106, l. 9-p. 108, l. 22]. As of January 29, 1979, Blocklin believed that Lykes might need—"would probably want to acquire"—containerships for use in the Pacific sometime in the future, and possibly during 1979 [Blocklin dep., p. 114, l. 21-p. 115, l. 12]. At the same time, Blocklin knew and understood that the January 29 Addendum placed a restriction on the ability of Lykes to enter containerships into the Pacific service [Blocklin dep., p. 95, ll. 9-14].

Lykes made no attempt to bid on the PFEL containerships. The three remaining ships went to APL, the sole bidder, for the $13 million minimum upset price—about 50% of their value [Blackwell dep., Ex. 3, pp. 2-3; Blackwell dep., p. 20, l. 11-p. 20, l. 13; p. 22, l. 19-p. 23, l. 8; p. 23, l. 18-p. 24, l. 19; p. 25, l. 11-p. 26, l. 21; Castro dep., Ex. 13 (memorandum dated 3/31/78, p. 1)].

REASONS FOR GRANTING THE WRIT

This case presents important issues of law in the interpretation of the Noerr-Pennington exception to the antitrust laws, and in the definition of antitrust immunity in the shipping industry.

ARGUMENT

A. The Noerr-Penninton Doctrine Has No Application to the Private Agreement Among Respondents and Lykes

The trial court's ruling is based on a finding that respondents had a "right to petition MARAD with respect to whether subsidies would be granted to Lykes." But the existence of such a right, assumed arguendo, is in no way dispositive. The "right to petition" finding made by the District Court and the Court of Appeals entirely overlooks the fact that the restrictive agreement in question was—on the uncontroverted record—created during the course of negotiations conducted in private between the top executives of Lykes, APL, SEA-LAND and U.S. Lines. These negotiations were opened at a meeting between Amoss and Seaton held privately at the University Club in Washington, D.C. That meeting occurred in December 1978—prior to the filing of any petition. At the same time that he was negotiating with Seaton, in December 1978, Amoss opened private negotiations with Bru of U.S. Lines and either Staunton or Johns of Sea-Land. [Amoss dep., p. 162, l.19; p. 176, l.13]. Additionally, Amoss met with SEA-LAND's chairman, Hiltzheimer, on January 4, 1979 [Staunton dep., Ex. 5 ¶ 1]. All of these meetings and contacts occurred prior to the filing of any petition, and after defendants had learned of Lykes' plans to enter the trans-Pacific trade. Negotiations were finally concluded, in private, at a residence in Bethesda, Maryland, over the weekend of January 13-14, 1979.

Confronted with the fact of these private negotiations, and the resulting privately agreed-to containership restriction, respondents urged, and the District Court agreed, that the "right to petition" immunity covers and includes a private "right to settle". But this is plainly not the law. Nor could it be. Were it otherwise, every private agreement to divide markets, boycott or fix prices would

be immunized from antitrust scrutiny if stipulated to in settlement of threatened or pending litigation.

Petitioner submits that the fact that the agreement between Lykes and respondents was private is, as a matter of law, fatal to respondents' assertions of immunity. The fact that defendants carried a privately negotiated restriction to MARAD for its blessing is no help to them, especially when it is admitted by defendants that MARAD was acting as a "passive pawn to private negotiations." (Tavrow dep., Ex. 20, p. 2.) See *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 60 S.Ct. 811. (No immunity arises from mere agency approval of an anticompetitive scheme.)

B. Only FMC, Not MARAD, Could Immunize the Kind of Activity Revealed in This Case

The restriction negotiated privately between respondents and Lykes included a provision that the restriction would be inserted into Lykes' subsidy contract with MARAD. The lower courts espoused respondents' argument that MARAD's acceptance of the private restriction properly supported respondents' claim of immunity [DKT. 395, pp. 35-37]:

Petitioner submits that the lower courts simply confused MARAD with the Federal Maritime Commission. Thus, while it is true that certain conduct engaged in by ocean shippers may, if approved in advance by the proper regulatory authority, be accorded antitrust exemption, the only regulatory agency which has any power to exempt or immunize conduct engaged in by ocean shippers from the federal antitrust laws is the Federal Maritime Commission, not MARAD. And Section 15 of the Shipping Act of 1916 specifically delineates the procedure which must be adhered to if such an exemption is to be obtained, 46 U.S.C. § 814. The statute requires that the ocean carriers immediately file a copy of any agreement or understanding which, in whole or in part, controls, regulates, prevents or destroys competition, or which in any manner provides for a "cooperative working arrangement". The statute mandates that, after filing, notice be given and a hearing be conducted, and provides specific criteria for the approval or disallowance of any proposed agreement.

Finally, the statute provides that only such agreements as are, after filing, notice and hearing, specifically approved by the Federal Maritime Commission shall be excepted from the federal antitrust laws, *Carnation Co. v. Pacific Westbound Conf.*, 383 U.S. 213, 86 S.Ct. 781, 783-784 (1966).

Even if some regulatory entity could, by its ratification of an otherwise illegal agreement among private parties, confer *Noerr-Pennington* immunity MARAD was simply not that agency, the Federal Maritime Commission was. This Court's opinion in *Carnation Co. v. Pacific Westbound Conference*, 86 S.Ct. 781 (1966) is instructive. For the court's discussion of the Shipping Act of 1916 (i.e., 46 U.S.C. § 801-842), Mr. Justice Warren compared the Shipping Act with the Agricultural Marketing Agreement Act of 1937 (i.e., 7 U.S.C. § 601 et seq.) and reiterated the Supreme Court's rationale for strictly construing that statute as expressed in *United States v. Borden Co.*, 308 U.S. 188, 201 (1939):

> The court there declared that the "explicit provisions requiring official participation and authorization show beyond question how far Congress intended that the Agricultural Act should operate to render the Sherman Act inapplicable. If Congress had desired to grant any further immunity, Congress doubtless would have said so." *Id. supra* at 784.

What a fair reading of *Carnation* indicates is that Congress had specifically identified a statutory scheme under which participants in the shipping industry may seek Sherman Act immunity and that is contained in 46 U.S.C. § 814. Where such an express statutory procedure is identified, it is encumbent upon any entity seeking to immunize their activity from Sherman Act liability to avail themselves of that procedure not some other which they may prefer. Thus, it is no significance to argue, as respondents do, that:

> The antitrust immunity which defendant's claim does not rest on the Shipping Act or any other statute. It rests on the *Noerr-Pennington* doctrine, which is based on the First Amendment. (Appellees' Brief, p. 29)

The point is that the manner in which respondents were required to invoke that immunity was specifically delineated by Congress in this instance and overlooking such direction negates their ability to invoke *Noerr-Pennington*.

CONCLUSION

The petition should be granted.

Dated: August 26, 1986

Respectfully submitted,

JOSEPH M. ALIOTO
ALIOTO & ALIOTO
Attorneys for Petitioner

Appendix A

Not for Publication

United States Court of Appeals

For the Ninth Circuit

No. 85-1978
D.C. No. C-82-1495-TEH

Assigned Container Ship Claims, Inc.,
a California corporation,

Plaintiff-Appellant,

v.

American President Lines, Ltd., a corporation;
Sea-Land Service, Inc., a corporation;
United States Lines, Inc., a corporation,

Defendants-Appellees.

Order
[Filed May 30, 1986]

Appeal from the United States District Court
for the Northern District of California

Before: Goodwin, Hug, and Reinhardt, Circuit Judges.

The panel as constituted in the above-entitled case has voted to deny the petition for rehearing filed by appellant Assigned Container Ship Claims, Inc. on April 1, 1986.

The petition for rehearing is DENIED.

Appendix B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ASSIGNED CONTAINER SHIP CLAIMS, INC., a California corporation,
Plaintiff-Appellant,

v.

AMERICAN PRESIDENT LINES, LTD., a corporation; SEA-LAND SERVICE, INC., a corporation; UNITED STATES LINES, INC., a corporation,
Defendants-Appellees.

No. 85-1978
D.C. No. C-82-1495-TEH
OPINION

Argued and Submitted
February 11, 1986—San Francisco, California

Filed March 18, 1986

Before: Alfred T. Goodwin, Procter Hug, Jr. and Stephen Reinhardt, Circuit Judges.

Opinion by Judge Hug

Appeal from the United States District Court
for the Northern District of California
Thelton E. Henderson, District Judge, Presiding

SUMMARY

Antitrust

Appeal from a grant of summary judgment for the defendants in an antitrust action based on the *Noerr-Pennington* doctrine. Affirmed.

Appellant purchased an antitrust claim from a bankruptcy trustee of a shipping line, and filed suit against the defendants, alleging they conspired to prevent another steamship company from bidding on three of the bankrupt company's container ships by petitioning the Federal Maritime Administration (MARAD) to limit the company's authority to conduct subsidized containership operations in the Pacific. Appellant claims this conduct violated the Sherman Act, 15 U.S.C. §§ 1 and 2. The original complaint was dismissed for failure to state a claim because the claim was barred by the *Noerr-Pennington* doctrine exception to antitrust laws. Appellant amended its complaint to allege two distinct conspiracies. The first was identical to the original but added an allegation that the defendants conspired to file a "sham" petition with MARAD, bringing in an exception to *Noerr-Pennington*. The second pertained to an agreement among defendants themselves that they would not bid against each other at the auction. Defendants filed for summary judgment and the district court granted the motion on *Noerr-Pennington* grounds.

[1] The three cases behind the *Noerr-Pennington* doctrine established an exemption from antitrust laws for group solicitation of government action, placing the Constitution's fifth amendment guarantee of a right to petition the government above the Sherman Act's condemnation of monopolies in unreasonable restraint of trade. The doctrine shields from the Sherman Act a concerted effort to influence public officials regardless of intent, unless the petition is a sham. This has been defined as a petition undertaken solely to interfere with free competition and without the legitimate expectation that such efforts will induce lawful government action. **[2]** Appellant claims that the defendants filed a sham petition with MARAD subsidy boards objecting to the awarding of 20-year subsidy contracts to another company in order to keep that company from bidding on the bankrupt company's ships at auction. **[3]** The federal government is forbidden by law from subsidizing any flag ocean carrier service which

would be in addition to existing service without giving notice and an opportunity for a hearing concerning whether the existing flag service is adequate. [4] In the petition, defendants pointed out that the agreement reached with the other carrier left the carrier free to change the type of service provided without giving interested parties the required notice and hearing as required by law. [5] The president of the other carrier then agreed to modify the agreement to provide for notice and a hearing if in the future it decided to put full container ships into service in the Pacific. [6] Despite appellant's arguments that this process improperly removed the other carrier as a potential bidder, the defendant's petitions to MARAD were clearly within the purview of *Noerr-Pennington*. [7] The question of whether subsidies would be available on those routes was not resolved at the time the petitions were filed, [8] so the petitions were not a sham, and the *Noerr-Pennington* doctrine precludes antitrust liability.

COUNSEL

Alioto & Alioto, Joseph M. Alioto and Lawrence John Appel, San Francisco, California, for the plaintiff-appellant.

McCutchen, Doyle, Brown & Enersen and J. Thomas Rosch, San Francisco, California, for the defendants-appellees.

OPINION

HUG, Circuit Judge:

This case involves an interpretation of the *Noerr-Pennington* bar to antitrust liability. Assigned Container Ship Claims, Inc. ("Assigned") purchased an antitrust claim from the bankruptcy trustee of the Pacific Far East Lines, Inc. ("PFEL"). Thereafter, in April 1982, Assigned filed suit

against American President Lines, Ltd. ("APL"), Sea-Land Service, Inc. ("Sea-Land"), and United States Lines, Inc. ("U.S. Lines"), alleging that defendants had conspired to prevent Lykes Brothers Steamship Company ("Lykes") from bidding on three PFEL containerships by petitioning the Federal Maritime Administration ("MARAD") to limit Lykes's authority to conduct subsidized containership operations in the Pacific. Assigned claims that this conduct violated Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2 (1982). The original complaint was dismissed for failure to state a claim upon which relief could be granted on the ground that, as pleaded, it was barred by the *Noerr-Pennington* doctrine.

Assigned amended its complaint, alleging two distinct conspiracies. The first conspiracy was identical to the one alleged in the original complaint, except for an additional allegation that defendants conspired to file a "sham" petition with MARAD, which brought into play an exception to the *Noerr-Pennington* bar. The second conspiracy pertained to an agreement among defendants themselves that neither Sea-Land nor U.S. Lines would bid against APL at the bankruptcy auction of PFEL's container vessels. The amended complaint realleged, among other things, that the two conspiracies violated Sections 1 and 2 of the Sherman Act,[1] 15 U.S.C. §§ 1, 2.

Defendants filed for summary judgment on March 30, 1984. The district court granted the motion on the ground the *Noerr-Pennington* doctrine precludes antitrust liability. This appeal followed. The sole issue is whether the *Noerr-Pennington* doctrine shields defendants' MARAD petition from antitrust liability.[2] We have jurisdiction under 28

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[1]Assigned does not contest that a summary judgment for defendants on the antitrust counts requires a grant of summary judgment for defendants on the remaining counts as well.

[2]The district court granted summary judgment in defendants' favor on the bid-rigging claim as well. Assigned did not raise the propriety of that ruling as an issue either in its "Issue Presented for Review," in its "Argu-

U.S.C. §§ 1291 and 1294(1) (1982) and affirm the district court's entry of summary judgment.

A grant of summary judgment is reviewed *de novo*. *Lojek v. Thomas*, 716 F.2d 675, 677 (9th Cir. 1983). The reviewing court must determine whether there is any genuine issue of material fact and whether the substantive law was correctly applied. *Zoslaw v. MCA Distributing Corp.*, 693 F.2d 870, 883 (9th Cir. 1982), *cert. denied*, 460 U.S. 1085 (1983). The burden of demonstrating the absence of an issue of material fact lies with the moving party. *Id.* If a defendant can present probative evidence that rebuts plaintiff's allegations of conspiracy, the plaintiff must then come forward with specific factual support for its allegations of conspiracy, or summary judgment for the defendant is appropriate. *ALW, Inc. v. United Air Lines, Inc.*, 510 F.2d 52, 55 (9th Cir. 1975). Plaintiff must rebut the defendant's showing by presenting " 'significant probative evidence tending to support the complaint.' " *General Business Systems v. North American Philips Corp.*, 699 F.2d 965, 971 (9th Cir. 1983) (quoting *First National Bank v. Cities Service Co.*, 391 U.S. 253, 290 (1968)).

[1] A trilogy of Supreme Court cases has established an exemption from the antitrust laws for group solicitation of government action. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510-11 (1972); *United Mine Workers v. Pennington*, 381 U.S. 657, 669-71 (1965); *Eastern Railroad President's Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-38 (1961). These cases, in essence, distinguish governmental from private action and place the importance of the Constitution's fifth amendment guarantee of a

---

ment," or at oral argument, nor did it challenge that ruling by the district court in its "Motion to Reconsider." Therefore, whether summary judgment was properly granted on Assigned's claim that Sea-Land and U.S. Lines agreed not to bid against APL for the three PFEL ships is not an issue on appeal. *See International Union of Bricklayers Local 20 v. Martin Jaska, Inc.*, 752 F.2d 1401, 1404 (9th Cir. 1985).

right to petition the Government above the Sherman Act's condemnation of monopolies and combinations in unreasonable restraint of trade. The doctrine fashioned in those cases "shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose," *Pennington*, 381 U.S. at 670, unless the petition authority is a "sham." *California Motor Transport*, 404 U.S. at 515-16. In this circuit, a "sham petition" has been defined as a petition "undertaken solely to interfere with free competition and without the legitimate expectation that such efforts will in fact induce lawful government action." *Omni Resource Development Corp. v. Conoco, Inc.*, 739 F.2d 1412, 1413 (9th Cir. 1984).

[2] In this case, Assigned claims that the three defendants conspired to file a sham petition with MARAD for the purpose of preventing Lykes from bidding on the three PFEL containerships. More specifically, the controversy involves two MARAD Subsidy Board decisions in December 1978 and January 1979. On December 8, 1978, MARAD's Subsidy Board awarded Lykes a renewed long-term (twenty-year) operational differential subsidy contract. At that time, Lykes provided no West Coast-Pacific service on Pacific Trade Routes 17 and 29. The only companies providing *containership* service on Trade Routes 17 and 29 were defendants APL, U.S. Lines, and Sea-Land. Shortly after the December 8 subsidy award, Lykes acquired three RO/RO ships (ships from which cargo can be rolled on and off), which were previously owned and operated by States Steamship Company ("States"). These vessels were authorized by MARAD to provide up to ninety-five subsidized sailings on Trade Routes 17 and 29. Because of this purchase, Lykes gained access to important Pacific trade routes.

On January 2, 1979, MARAD issued a letter to Lykes confirming the renewal of Lykes's long-term differential subsidy contract for twenty years and containing, as "Part M," an addendum setting forth certain understandings between

MARAD and Lykes respecting Lykes's acquisition of States's RO/RO ships (hereinafter "January 2 Addendum"). The January 2 Addendum provided, among other things, that for the twenty-year period covered by Lykes's subsidy contract, (1) Lykes was authorized to perform subsidized service on Trade Routes 17 and 29 with the three RO/RO ships and up to six conventional ships from the Lykes fleet and, in addition, (2) "interchange (substitution) and transfer privileges" would be granted to all Lykes's vessels between all services. The January 2 Addendum thus allowed Lykes to change the type of service on Trade Routes 17 and 29 by substituting containerships for the RO/RO and conventional ships during the twenty-year period.

[3] Section 605(c) of the Merchant Marine Act of 1936 ("Act"), 46 U.S.C. § 1175(c) (1982), prohibits the Federal Government from subsidizing any United States flag ocean carrier service "which would be in addition to existing service" without giving notice and an opportunity for a prior hearing of all interested parties concerning (1) whether the existing flag service is adequate, and (2) whether the additional service would further the purposes of the Act. Section 605(c) has been interpreted to require notice and an opportunity for a hearing in circumstances very similar to those involved here. The D.C. Circuit in *Sea-Land Service, Inc. v. Connor,* 418 F.2d 1142, 1148 (D.C. Cir. 1969), held that the notice and hearing requirements of section 605(c) applied when the carrier made application to change from conventional breakbulk service to containership service. MARAD has subsequently required notice and hearing under section 605(c) in such circumstances. Delta Steamship Lines, Inc., 22 Shipping Regulations Reporter (P&F) 226, 231 (MSB 1983); Prudential Lines, Inc., 17 Shipping Regulations Reporter (P&F) 1471, 1496 (MSB 1977).

[4] On January 12, 1979, APL filed a petition for reopening of the January 2 Addendum for purposes of reconsideration. In that petition, APL asked MARAD's Subsidy Board to

"reconsider its 'understanding' with Lykes." APL pointed out that the understanding described in the January 2 Addendum left Lykes free, for a period of twenty years, to change the type of service that States had provided on the two Pacific trade routes by substituting containerships for the RO/RO and conventional vessels used by States and Lykes, without giving interested parties prior notice and an opportunity to be heard as required by section 605(c). APL, therefore, requested that MARAD advise Lykes either (1) that the understanding as it then stood was rescinded as unlawful, or (2) that the understanding would be implemented only after section 605(c) procedures were followed and Lykes had accepted the same subsidy and other funding terms required by other subsidized operators. U.S. Lines filed a petition similar to APL's on January 15, 1979, and Sea-Land informed MARAD and interested parties that it reserved the right to file a petition unless the relief sought by APL and U.S. Lines was granted.

[5] Lykes's president and chief executive spoke with APL's president and its executive vice president and agreed, subject to MARAD approval, to modify the January 2 Addendum to provide for notice and a hearing if, in the future, Lykes decided to put full containerships into service on States's Pacific trade routes. After review and revision by counsel for APL and Lykes, and then by counsel for Sea-Land and U.S. Lines—the other parties entitled to notice—the proposed amendment was submitted to MARAD for its approval. The proposed amendment provided, in pertinent part, that "Lykes shall not enter containerships into service on Trade Route 29 or Trade Route 17 (Pacific), whether directly or as top-offs, nor be required to replace existing vessels with containerships for such service, without prior notice and opportunity for hearing under Section 605(c) of the Act." APL and U.S. Lines withdrew their petitions contingent upon the adoption by MARAD of the amendment.

[6] Assigned argues that this petitioning process improperly removed Lykes as a potential bidder of PFEL's three con-

tainerships. However, APL's and U.S. Lines's petitions to MARAD are clearly within the purview of the *Noerr-Pennington* doctrine. In petitioning MARAD to rescind the January 2 Addendum in that form or, alternatively, to read into the agreement the notice and opportunity to be heard requirements of section 605(c), petitioners were simply asking MARAD and Lykes to comply with the law. Under these circumstances, absent a showing that the petition was a "sham," petitioning MARAD was immune from antitrust liability.

As stated earlier, a "sham petition" has been defined as a petition "undertaken solely to interfere with free competition and without the legitimate expectation that such efforts will in fact induce lawful government action." *Omni*, 739 F.2d at 1413. In this case, Assigned claims that the MARAD petitions were not filed in a genuine effort to influence governmental action since section 605(c) bars a subsidy award only if the service currently provided by United States flag vessels is inadequate, and that APL knew that existing service was inadequate because it had pending an application to MARAD for twenty-six additional sailings.

[7] Whether Trans-Pacific United States flag containership service was adequate, even in 1978, was unresolved when the petitions were filed in January 1979. APL claimed that the service was inadequate in connection with its application in 1978 for twenty-six additional subsidized sailings. After APL applied to MARAD in 1978, section 605(c) notice was given. APL's alleged co-conspirators, U.S. Lines and Sea-Land, objected to APL's application, taking the position that the service was adequate without the twenty-six sailings APL sought. A hearing was held, but at the time defendants petitioned MARAD regarding the January 2 Addendum, MARAD had not made a decision on APL's request.

[8] Moreover, even if MARAD had decided that Trans-Pacific service was inadequate in 1978, that clearly would not

have resolved the issue created by the proposed January 2 Addendum. The addendum purported to leave Lykes free to substitute containerships for conventional vessels without section 605(c) notice and opportunity for hearing any time within the next twenty years. Since Lykes had an open-ended conversion privilege that would last twenty years, the issue of whether existing United States flag containership service was adequate or not could vary substantially over the life of the agreement, irrespective of APL's current application. Furthermore, APL was asking only that Lykes be required to comply with the same procedures with which APL currently was being required by law to comply. The sham exception, therefore, does not apply to the facts of this case, and the *Noerr-Pennington* doctrine precludes antitrust liability.

AFFIRMED.

Appendix C

United States District Court
for the Northern District of California
Civil Actin File No. C-82-1495-TEH
Assigned Container Ship Claim, Inc.,
a California Corp.,
Plaintiff,
vs.
American President Lines, Ltd.,
a corporation, et. al.,
Defendants

JUDGMENT
[Filed April 3, 1985]

This action came on for (hearing) before the Court, Honorable Thelton E. Henderson, United States District Judge, presiding, and the issues having been duly (heard) and a decision having been duly rendered,

It is Ordered and Adjudged

that

(1) plaintiff's motion for reconsideration is denied;
(2) defendants' motion for summary judgment on the anti-trust causes of action of the Second Amended Complaint (Count I) is granted;
(3) defendants' motion for summary judgment on Counts two through six is granted;
(4) the complaint is dismissed.

Dated at San Francisco, this 2nd day of April, 1985.

William L. Whittaker
Clerk of Court

By: /s/ Thelton E. Henderson
Thelton E. Henderson
United States District Judge

In The United States District Court
For The Northern District Of California

No. C 82-1495 TEH

Assigned Container Ship Claims, Inc.,
a California corporation,
Plaintiff,

v.

American President Lines, LTD.,
a corporation, *et al.*,
Defendants.

ORDER
[Filed April 3, 1985]

On December 11, 1984, Judge Charles A Legge heard oral argument on defendant's motion for summary judgment in the above-captioned case. At the close of the hearing, Judge Legge ruled that "[t]he motion for summary judgment will be granted to the defendants on the antitrust causes of action, which is the first claim of the second amended complaint." Transcript at 77. On December 20, 1984, plaintiff noticed a motion to reconsider which was eventually set for hearing on February 15, 1985. Prior to the hearing, Judge Legge recused himself from further participation in the action and the case was eventually assigned to this Court by order of Chief Judge Robert Peckham on February 22, 1985.

Now before this Court is plaintiff's motion for reconsideration, defendants' motion for summary judgment as to the second through sixth counts of the second amended complaint, and defendants' request for the Court's signature on defendants' proposed order granting defendants' motion for summary judgment.

I. Plaintiff's Motion for Reconsideration

Plaintiff's motion for reconsideration addresses that portion of Judge Legge's ruling that there was no triable issue of fact as to the alleged "conspiracy among the defendants to in some bar

[Lykes Brothers Steamship Company, Inc.] from bidding on the [Pacific Far East Lines] ships." Transcript at 74, 75-77.

We conclude that Judge Legge's findings with respect to the above matter are well supported by the record, and his conclusions well supported by the applicable law. Having failed to demonstrate a sufficient basis for reconsidering Judge Legge's resolution of the issues raised in the above matter, plaintiff's motion for reconsideration is HEREBY DENIED.

In their opposition to plaintiff's motion for reconsideration, defendants request reimbursement for expenses and attorney fees incurred in responding to the motion pursuant to 28 U.S.C. § 1927. This request is HEREBY DENIED.

II. Request for the Court's Signature on Defendants' Proposed Order Granting Defendants' Motion for Summary Judgment.

After stating at the December 11th hearing that "[t]he motion for summary judgment will be granted to the defendants on the antitrust causes of action, which is the first claim of the second amended complaint," Judge Legge requested that "defendants . . . prepare the appropriate form of order." Transcript at 77. Defendants subsequently submitted a proposed form of order which states, in part, that "defendants' motions for summary judgment as to all antitrust causes of the Second Amended Complaint, *i.e.*, Count I, are hereby granted."

In his order of February 13, 1985, Judge Legge noted that the parties did not agree on the proposed form of the order and that the order had not yet been signed (p. 2) but suggested that the judge to whom the case was reassigned consider "[s]ignature of the proposed order granting defendants' motion for summary judgment on Count I, or the reconsideration of that decision under plaintiff's motion for reconsideration." (pp. 3-4).

Plaintiff objects to the proposed form of order submitted by defendants on the grounds that Count 1 of the Second Amended Complaint includes both a conspiracy claim (15 U.S.C. § 1) and an attempt to monopolize claim (15 U.S.C. § 2) and that Judge

Legge only granted summary judgment for defendants on the former.

Our understanding, after discussing the matter with Judge Legge, is that he intended to grant defendants' motion for summary judgment as to all of Count 1, and we conclude that this result is supported by the existing record in this case. Accordingly, defendants' proposed order granting summary judgment on the antitrust causes of action of the Second Amended Complaint is approved and will be signed and filed contemporaneously with the filing of this Order.

III. Defendants' Motion for Summary Judgment on the Second Through Sixth Claims

Plaintiff does not contest that a summary judgment for defendants on Count 1 of the second amended complaint requires a grant of summary judgment for defendants on the remaining counts as well. Therefore, defendant's motion for summary judgment on counts 2-6 of the second amended complaint is HEREBY GRANTED.

IV. Sanctions

In his Order of February 13, 1985, Judge Legge also suggested that the Judge to whom the case was reassigned consider the following matter: "Whether sanctions should be awarded against plaintiff or its counsel, and in favor of defendants, to compensate defendants for their expenses in connection with the motion proceedings which occurred after the case was reassigned to the undersigned on October 23, 1984, if it appears that plaintiff should have made the motion for disqualification immediately after receipt of the notice of the reassignment of this case to the undersigned." (p. 4).

After reviewing the relevant papers and affidavits, we conclude that this matter is worthy of further investigation by this Court. Thus, we HEREBY ORDER plaintiff and its counsel TO SHOW CAUSE why sanctions should not be awarded against it and in favor of defendants in this matter. Such hearing shall commence on May 20, 1985, at 3:00 p.m. To the extent necessary, the hearing will be evidentiary and include the taking of testimony.

Plaintiff shall file its opening brief by April 19, 1985 and shall attach 1) a complete and final list of all affidavits it intends to rely upon with copies thereof attached, and 2) a complete and final list of all witnesses, if any, who it will call to testify at the hearing, including a summary of the content of the expected testimony of each witness, if any, and the expected length of the testimony. Defendants shall file their responsive brief by May 3, 1985 and shall include the same attachments as required for plaintiff's opening brief as listed above. Plaintiff's reply brief, if any, shall be filed no later than May 10, 1985.

IT IS SO ORDERED.

Dated: April 2, 1985

/s/ Thelton E. Henderson
Thelton E. Henderson
United States District Judge

Accordingly, good cause appearing, IT IS HEREBY ORDERED that defendants' motions for summary judgment as to all antitrust causes of action of the Second Amended Complaint, i.e., Count I, are hereby granted.

APPROVED AS TO FORM:

_____

IT IS SO ORDERED.

Dated: April 2, 1985

/s/ Thelton E. Henderson
Thelton E. Henderson
Judge United States District Court,
Northern District of California

Appendix D

Transcript of Proceeding Before Hon. Charles Legge,
December 11, 1984

* * * have the right to do so, and I don't think there can be much doubt about that, they would have the court say that the parties could not then resolve it subject to Marad's approval, which was done, but rather have it litigated forever.

That was a senseless conclusion. That is what the plaintiffs ask the court to conclude, and I respectfully submit, your Honor, there is simply no basis for that.

Thank you.

The Court: Anything further, Counsel?

Is the matter submitted?

Mr. Rosch: Yes, your Honor.

Mr. Alioto: Yes, your Honor.

The Court: The following will be the decision of the court, which I will give in verbal form rather than preparing a written order or opinion.

This is a motion for summary judgment by the defendants. Judge Samuel Conti has previously considered these motions and has summarized the arguments and the basic allegations and claims, so it's not necessary for me to do that here.

In his last order, specifically the order of September 28, 1984, he stated that, in his view, the motion for summary judgment dealt with the issue of conspiracy, and he directed further briefs and particularized cites to the record on that issue, and set a discovery cutoff date on those issues.

Discovery is now closed. And the discovery record is quite extensive.

Because of Judge Conti's prior rulings, there is no necessity for me to cite or repeat the applicable law or the applicable legal standards to be applied to this motion.

The plaintiff in essence alleges two conspiracies; one a conspiracy among the defendants so that defendants Sea-Land and United States Lines would not bid for the PFEL ships, the other a conspiracy among the defendants to in some way bar Lykes from bidding on the PFEL ships.

The defendants contend that there is no triable issue of fact on either of the allegations.

The standard for this court is whether there is any evidence which the plaintiff has supplied which would justify a jury ruling for the plaintiff on a genuine issue of material fact.

The court has read all the evidentiary material which has been cited by the plaintiff, and most of that cited by the defendants, and comes to the following conclusions.

First of all, was there any agreement among the defendants that Sea-Land and/or U.S. Lines would not bid? The defendants' declarations establish affirmative evidence that there was no such agreement.

I do not believe that the plaintiff has shown material evidence to contradict the evidence supplied by the defendants; that is, it has not supplied sufficient evidence to create a triable issue of fact. Plaintiff has made extensive arguments on circumstantial evidence and direct evidence, and very competent arguments and extensions from what the record shows, but I don't believe sufficient evidence for me to submit to a jury on the question of whether there was such a conspiracy.

Secondly, whether there was some agreement or actions by the defendants to keep Lykes out of the containerized shipping market in the Pacific and, hence, to preclude Lykes from bidding on PFEL ships.

The evidence is clear the defendants did petition Marad. The court believes the defendants had a right to do so, a legal right to do so, and that their activities in the regard were protected under the Noerr-Pennington rules unless those petitions were a sham.

The defendants were obviously concerned about the possibility of Lykes' competition in the Pacific market. I believe, under the

statutes and regulations, that the defendants had a legitimate right to be concerned and to petition Marad with respect to whether subsidies would be granted to Lykes.

The efforts of petitions resulted in a noticed provision in the agreement between Marad and Lykes. The Court believes that this noticed provision was what was legally required under the statute anyway, but is willing to accept the plaintiff's argument that this noticed provision performed the function or was a practical restriction on Lykes' ability to operate.

But, as I said, the court believes that the defendants here were entitled to that kind of a noticed provision. So, the court does not believe that is sufficient evidence for the jury to find that the petitioning was a sham.

The jury certainly could find that the agreement did, in fact, restrict Lykes' ability to get into the container business in the Pacific, but because the notice requirement was what I believe the defendants are entitled to, and because all the evidence shows that Lykes had no interest in bidding and perhaps no ability to bid for the PFEL vessels in early 1979, I do not believe that there is sufficient evidence to submit to a jury that Lykes would, or could have, bid for the PFEL ships.

So, whatever restrictions might have as a result of the proceedings before Marad been put on Lykes for its long-range competitive disadvantage, if that is indeed what it was, there is not sufficient evidence that it had impact on the possibility of Lykes' bidding for the PFEL ships in April of 1979 or, indeed, a reasonable time thereafter.

So I believe, under the standards of the Ninth Circuit and the Clipper Exxpress and Omni decisions, that the defendants' activities with respect to the Lykes proceeding under the protection of Noerr-Pennington, that there is an absence of sufficient evidence that there was a violation impact on plaintiff.

The motion for summary judgment will be granted to the defendants on the antitrust causes of actin, which is the first claim of the second amended complaint.

I request the defendants to prepare the appropriate form of order.

As to the remainder of the case, the defendants argue that the rest of this case should fall since the court has granted summary judgment on the first count. However, Judge Conti, in his most recent order, did narrow the issues for resolution on this motion, and plaintiffs have not had an opportunity to address or brief the question of whether once the summary judgment motion is granted on the first count, the rest of the action should necessarily fall.

So I ask the defendants to file a further motion for summary judgment with respect to the remaining issues in the case if they believe that as a result of this court's rulings today that the rest of the case should be disposed of by summary judgment, too.

If the defendants are going to so move, I would request that they do so within the next 30 days. If they are not going to do so, would they please advise the court that they are not going to do so, and then the court will schedule a further status conference for the handling of the remainder of the case.

Now, of course, if the defendants do file a motion for summary judgment, then the plaintiffs will have an opportunity to reply under the normal briefing schedule of the court.

Mr. Appel: Your Honor, may I raise one procedural point?

The Court: Yes.

Mr. Appel: The discovery so far has been limited to the issue of conspiracy.

The Court: I understand.

Mr. Appel: There are other issues that are joined by the complaint answer. We would like to have an opportunity to take our discovery on market share and other conspiracy issues that exist, and that's going to take more than 30 days, certainly.

The Court: Well, what I am asking the defendants to do is to file a further motion that addresses the question of whether because of the ruling I just made the rest of the case falls away as a matter of law.

Mr. Appel: With or without discovery?

The Court: With or without discovery. If you convince me that in order to rule that it's a fact question, or you have to have discovery on it, then you can base your opposition on that ground.

Mr. Appel: I understand Rule 56(n) gives us an opportunity to do that, but out of courtesy to the court, I was just pointing out that we haven't had discovery on issues that are critical to that.

The Court: And if that is so—I mean, I haven't focused on it, so I don't know whether I agree or disagree—but if that is so, you will be given adequate opportunity for discovery before ruling on the motions.

But, as I understand the defendants' position from what I believe is a footnote in one of their briefs, that they believe that if I rule as I did today, that the whole case is gone as a matter of law. So that's what I want to focus our attention on before deciding whether that is true before going down the track to discover other issues.

Mr. Alioto: Your Honor, may I make one request? That is, that because of the separate section or the other count, that the entry of judgment not be made under Rule 54(b)?

The Court: No, I don't think—I agree with that, because I don't know whether we are going with the rest of this case yet. So I don't think we need to do that.

Perhaps the term "interim" isn't the proper term, but I don't think we need to treat the resolution of this issue as one that is immediately final and immediately appealable.

Anything else?

Thank you, counsel. A very fine job and very complete job on both sides.

Mr. Rosch: Thank you, your Honor.

Mr. Alioto: Thank you, your Honor.

Mr. Litvack: Thank you, your Honor.

Mr. Gordon: Thank you, your Honor.

Mr. Appel: Thank you, your Honor.

The Clerk: This court is now in recess.

[Whereupon, the proceedings were concluded.]

Supreme Court, U.S.
FILED
SEP 29 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-348

In The

Supreme Court of the United States

October Term, 1986

ASSIGNED CONTAINER SHIP CLAIMS, INC.,
Petitioner,

v.

AMERICAN PRESIDENT LINES, LTD., SEA-LAND SERVICE, INC., AND UNITED STATES LINES, INC.,
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' CONSOLIDATED BRIEF IN OPPOSITION

Lasky, Haas, Cohler & Munter P.C.
Charles B. Cohler
Terry M. Gordon
505 Sansome Street
San Francisco, CA 94111
(415) 788-2700

Robert S. Zuckerman*
Sea-Land Service, Inc.
P. O. Box 800
Iselin, New Jersey 08830
(201) 632-2222

Counsel for Respondent Sea-Land Service, Inc.

Donovan Leisure Newton & Irvine
Sanford M. Litvack*
Vivian Polak
303 Rockefeller Plaza
New York, New York 10112
(212) 307-4100

Carr & Mussman
Timothy E. Carr
Lenell Topol
Three Embacardero Center
San Francisco, CA 94111
(415) 391- 7112

Counsel for Respondent United States Lines, Inc.

McCutchen, Doyle, Brown & Enersen
J. Thomas Rosch
John N. Hauser*
Brenda G. Woodson
Three Embarcadero Center
San Francisco, CA 94111
(415) 393-2000

Counsel for Respondent American President Lines, Ltd.

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

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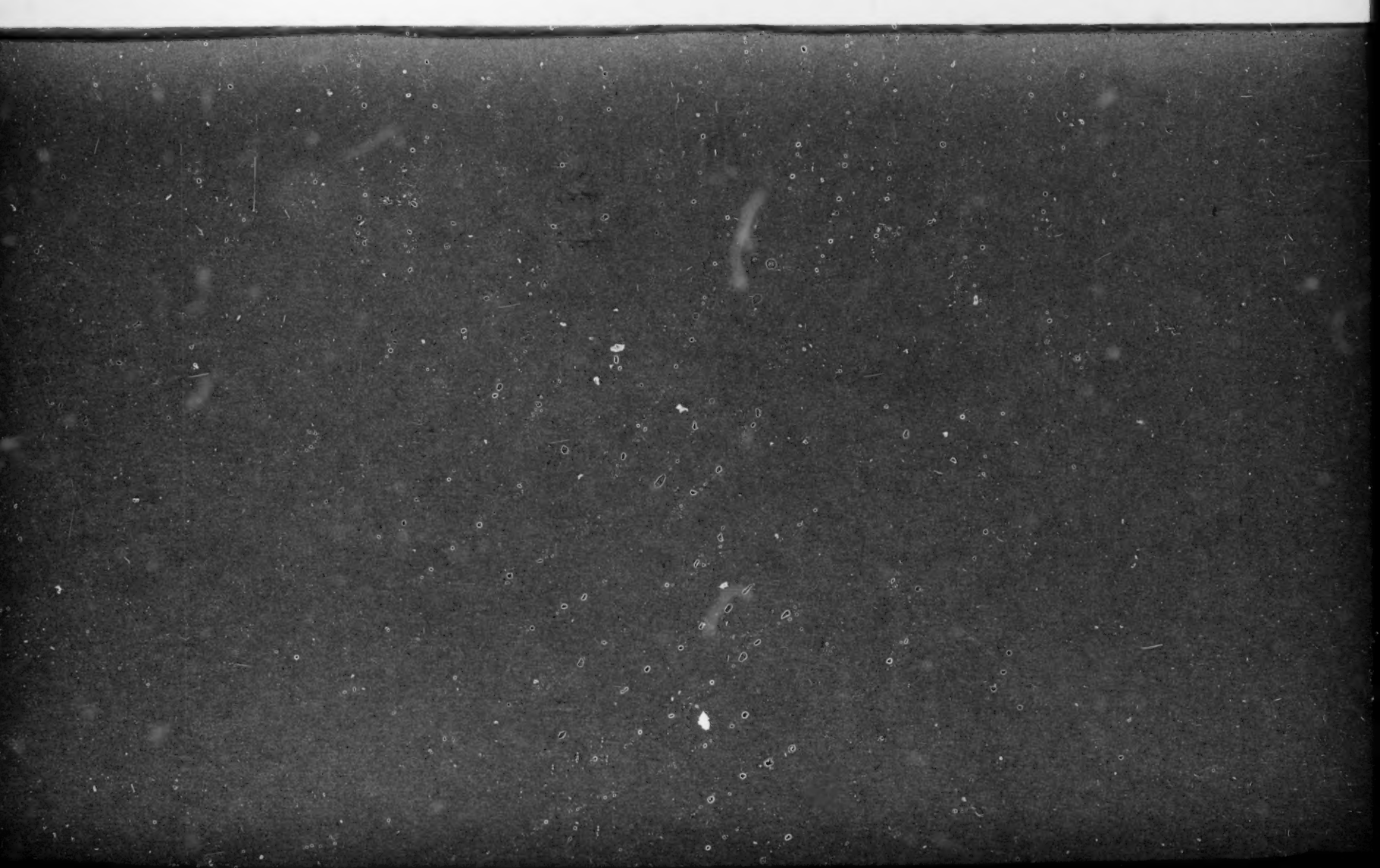

QUESTION PRESENTED

Do the "special and important reasons" required for the granting of review on writ of certiorari (Rule 17.1) exist here, where (a) the judgment for respondents was affirmed simply on the ground that there was no substantial evidence to take the petitioning process attacked by petitioner out of the *Noerr-Pennington* doctrine, (b) in fact there was no such substantial evidence and (c) lack of causation furnished an additional and independent basis for the judgment?

RULE 28.1 LISTING

Respondent American President Lines, Ltd. is a wholly-owned subsidiary of American President Companies, Ltd.

Affiliated companies of respondent United States Lines, Inc. are First Colony Farms, Inc. and McLean Industries, Inc.

Respondent Sea-Land Service, Inc., is a wholly-owned subsidiary of Sea-Land Corporation. However, on April 25, 1986, Sea-Land Corporation, CSA Acquisition Corp., and CSX Corporation ("CSX") entered into an Agreement and Plan of Merger providing for the acquisition of Sea-Land Corporation pursuant to a tender offer ("Offer") for all outstanding shares of common stock of Sea-Land Corporation at $28 in cash per share. Pursuant to the Offer, CSX (through CSA Acquisition Corp., a wholly-owned subsidiary which will ultimately be merged with and into Sea-Land Corporation) acquired a total of 15,580,642 shares of Sea-Land Corporation common stock. On July 23, 1986, CSX acquired through the exercise of options (obtained on April 25, 1986) an additional 9,183,831 shares. CSX has acquired an additional 27,900 shares through open market purchases.

All Sea-Land Corporation shares owned or acquired by CSX or any subsidiary of CSX are being or will be held in an interim voting trust with Midlantic National Bank pending Interstate Commerce Commission approval of the acquisition of Sea-Land Corporation.

Non-wholly-owned subsidiaries of respondent Sea-Land Service, Inc. are Arabian Container Terminals Lim-

ited and Sea-Land Container Terminal Administration Co., Ltd. Affiliated companies of respondent Sea-Land Service, Inc. (defined as those companies which are subsidiaries of respondent's parent, Sea-Land Corporation) are Sea-Land Industries USA, Inc.; Sea-Land Industries (Bermuda) Ltd.; Container Freight Systems, Inc.; Interseas Operations Limited; SL Aircraft, Inc.; Sea Readiness, Inc.; Tacoma Terminals, Inc.; and Transportation Systems, Inc.

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No. 86-348

In The

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October Term, 1986

ASSIGNED CONTAINER SHIP CLAIMS, INC.,
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v.

AMERICAN PRESIDENT LINES, LTD., SEA-LAND SERVICE, INC., AND UNITED STATES LINES, INC.,
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' CONSOLIDATED BRIEF IN OPPOSITION

STATEMENT OF THE CASE

A. Proceedings Below.

The nominal plaintiff and petitioner in this case is Assigned Container Ship Claims, Inc. The antitrust claims it made below were purchased from the bankruptcy trustee of Pacific Far East Lines, Inc. ("PFEL"). (I SER. 55, ¶¶ 1, 2)[1] PFEL's trustee did not assert the claims himself

[1] Throughout this brief, "Pet." refers to the Petition for a Writ of Certiorari. "ER," preceded by the appropriate volume number (e.g., I ER), refers to the three-volume Excerpts of Record filed by appellant below; the reference will be followed by CPI's tab number and sometimes by more detailed citations, identifying the name of a witness and/or more detailed citations to pages within the documents appellant has tabbed. "SER," preceded by the appropriate volume number, refers to the two-volume Supplemental Excerpt of Record filed by appellees below, which will be followed by a tab number and sometimes by the more detailed citations described above.

because he was advised by two special antitrust counsel not to do so. (I ER 127, App. A, Int. Resp. 11(m).) But Robert Driscoll ("Driscoll"), petitioner's original attorney of record, purchased the claims for petitioner, a newly-formed corporation of which Driscoll was the sole incorporator, president, chief financial officer, director, and a shareholder. (I ER 127, App. B, Int. Resp. 7, 8, 10; I ER 127, App. C.) Driscoll then filed this lawsuit in petitioner's name.

The claim which Driscoll made in petitioner's original complaint was that respondents had filed petitions with the federal Maritime Administration ("MARAD") to restrict the authority of Lykes Brothers Steamship Company ("Lykes") to conduct subsidized containership operations in the Pacific. (I ER 1, ¶¶ 9-12.) The complaint alleged that respondents' petitioning activity had caused Lykes to refrain from bidding for three PFEL containerships sold at auction in April 1979 with the result that respondent APL allegedly was able to purchase the ships at less than their fair value. (*Id.*)

Shortly after the action was filed, Driscoll met with Lykes' Washington, D.C. counsel, who was also a part of Lykes' management team. Lykes' counsel told Driscoll (1) that the position taken by respondents in their MARAD petitions was one which MARAD itself had "consistently" taken (I SER 157, Kominers Depo. 159-60) and (2) that, in any event, Lykes never had any intention of bidding, nor the ability to bid, on the PFEL ships. (I SER 157, Kominers Depo. 166-167, 174-75). Despite this knowledge,

Driscoll filed a first amended complaint[2] and a second amended complaint repeating the claim that respondents had caused Lykes not to bid for the PFEL ships by filing baseless claims with MARAD. (I ER 34, ¶¶ 9-13; 1 SER 55, ¶¶ 17-24.)

As the case proceeded through discovery, the falsity of petitioner's claim was repeatedly confirmed by other disinterested third-party witnesses. MARAD's General Counsel at the time of the petitioning activity involved here testified that respondents were entitled to the relief sought in their petitions, as a matter of law. (I SER 299, Exh. 2, Caras Depo. 79-81.) Lykes' president testified that, regardless of the petitions, Lykes was financially and operationally unable to, and never intended to, acquire the PFEL ships. (II SER 374, Amoss Depo. 309-14, 327; II ER 129, Amoss Decl. ¶¶ 2-3.) Petitioner's assignor, the PFEL bankruptcy trustee, attested that Lykes' president had told him the same thing both before and after respondents filed their petitions. (I SER 307, Benedict Decl. ¶¶ 13, 20.) But the claim was not voluntarily dismissed, and so respondents had to move for summary judgment.

Summary judgment was granted by the District Court, and the Court of Appeals unanimously affirmed that judgment. It held that the petitioning process attacked by petitioner was covered by the *Noerr-Pennington* doctrine. It therefore did not consider the evidence which established that Lykes did not intend to bid on the PFEL ships in any

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[2] The original complaint was dismissed for failure to state a claim upon which relief could be granted on the ground that, as pleaded, it was barred by the *Noerr-Pennington* doctrine. (I ER 127, App. D.)

event, which furnished a separate basis for the judgment of dismissal.

In short, this lawsuit was brought by a straw plaintiff. It was prosecuted although the alleged victim told petitioner's assignor and petitioner's attorney that petitioner's critical allegations were false. It was summarily dismissed, and that dismissal was affirmed by a unanimous Court of Appeals. And, as discussed below, the petition to this Court does not present any of the "special and important reasons" which this Court's rules require be presented in a petition for writ of certiorari.

B. Statement of Facts.

1. *The Legal Background.* Section 605(c) of the Merchant Marine Act, 1936 (46 U.S.C. § 1175(c)) prohibits the federal government from subsidizing any ocean carrier service which constitutes an addition to existing U.S. Flag service without giving notice and the opportunity for a prior hearing to "each operator serving such . . . service" as to whether (1) the existing U.S. Flag service is inadequate and (2) the additional service would further the purposes and policies of the Act.

In 1969 the D.C. Circuit had occasion in *Sea-Land Service, Inc. v. Connor,* 418 F.2d 1142 (D.C. Cir. 1969) to interpret Section 605(c) in circumstances squarely relevant to this case. There MARAD had awarded subsidy to a containership service initiated pursuant to an amendment to an application for subsidized conventional breakbulk service. The D.C. Circuit held that the amendment broadened the original application "sufficiently to require notice and

opportunity for hearing to inquire into the need for such service." 418 F.2d at 1147-48.

Following *Connor,* MARAD held that while Section 605(c) did not require notice and hearing in every instance for the replacement of obsolete ships with the same type of ships under a continuing subsidy contract (*Waterman Steamship Corp.,* 13 Shipping Regulations Reporter (P&F) 472 (MSB 1972)), significant changes in type of service—such as substitution of containerships for conventional ships—would require notice and hearing pursuant to Section 605(c). *Delta Steamship Lines, Inc.,* 22 Shipping Regulations Reporter (P&F) 226, 231 (MSB 1983); *Prudential Lines, Inc.,* 17 Shipping Regulations Reporter (P&F) 1471, 1496 (MSB 1977). In 1979, however, MARAD took action which departed from this law and resulted in the petitioning activity which was the subject of this case.

2. *MARAD's Amendment to Lykes' Subsidy Agreement.* In January 1979, respondents American President Lines, Ltd. ("APL"), United States Lines, Inc. ("U.S. Lines") and Sea-Land Service, Inc. ("Sea-Land") were all U.S. Flag carriers, which were providing service by containerships on Pacific Trade Routes 17 and 29 (Pet. 2-3); as such, they were entitled to notice and hearing under Section 605(c). Lykes provided no service at all on Trade Route 29; no West Coast-Pacific Service on Trade Route 17; and no containership service anywhere. (Pet. 3.)

On December 8, 1978, MARAD's Subsidy Board awarded Lykes a renewed long-term operating differential subsidy contract covering Lykes' existing service. (I SER 55, ¶ 8; II SER 374, Amoss Depo., Exh. 7.) Shortly thereafter, Lykes acquired three RO/RO ships—ships from

which cargo can be rolled on and off.[3] (II SER 374, Amoss Depo. 126-28; I SER 55, ¶ 10.) These RO/RO ships previously had been owned and operated by States Steamship Company ("States"), which was authorized to provide up to 95 subsidized sailings on Trade Routes 17 and 29. (I SER 55, ¶ 9; II SER 374, Amoss Depo., Exh. 6.)

On January 2, 1979, MARAD issued a letter to Lykes confirming the renewal of Lykes' long-term differential subsidy contract for twenty years and containing, as "Part M," an Addendum (hereinafter "January 2 Addendum") setting forth certain "understandings" between MARAD and Lykes respecting Lykes' acquisition of States RO/RO ships. (II SER 374, Amoss Depo., Exh. 8, at 9-13). The January 2 Addendum provided, among other things, that for the twenty-year period covered by Lykes' subsidy contract (1) Lykes was authorized to perform subsidized service on Trade Routes 17 and 29 with the three RO/RO ships and up to six conventional ships from the Lykes fleet and, *in addition*, (2) "[i]nterchange (substitution) and transfer privileges" would be granted to all Lykes' vessels between all services. (II SER 374, Amoss Depo., Exh. 8, at 10-11.)

The January 2 Addendum thus seemed to allow Lykes to change the type of service on Trade Routes 17 and 29 by substituting containerships for the RO/RO and conventional ships at anytime during the twenty-year period without preserving the rights of interested parties to be given

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[3] Essentially all cargo ships are capable of carrying a limited number of containers, usually lashed to the deck. The term "containership" used in this case—as in the shipping trade—referred to ships fully dedicated and specially constructed or modified to carry containers. (I SER 141, Kozlowski Depo. 10.)

notice and an opportunity to be heard if Lykes chose to substitute containerships. Petitioner *itself* read the January 2 Addendum that way. It alleged in its second amended complaint that the Addendum left Lykes free to employ containerships under the subsidized operating authority Lykes had acquired from States. (I SER 55, ¶ 13.)

3. *Respondents' Petitions.* On January 12, 1979, APL filed a petition for reconsideration of the January 2 Addendum. (I ER 127, App. J at 16.) APL pointed out that the "understanding" described in the January 2 Addendum ran afoul of *Connor* by leaving Lykes free over a twenty-year period to change the type of service that States had provided on the two Pacific Trade Routes (and the limited service Lykes had provided on Trade Route 17) by substituting containerships for the RO/RO and conventional vessels used by States and Lykes, without giving interested parties prior notice and opportunity to be heard as required by Section 605(c). (*Id.* at 7.) APL's petition, therefore, requested that MARAD advise Lykes either (1) that the "understanding" as it then stood was rescinded as unlawful or (2) that the "understanding" would be implemented only after Section 605(c) procedures were followed and Lykes had accepted the same subsidy and other funding terms required of other subsidized operators. (*Id.* at 16-17.) U.S. Lines filed a petition similar to APL's on January 15, 1979 (I ER 151, Exh. 43), and Sea-Land informed MARAD and interested parties that it reserved the right to file a petition unless the relief sought by APL and U.S. Lines was granted. (I ER 151, Exh. 54.)

4. *Lykes' Agreement That 605(c) Notice Be Given.* Lykes' counsel was Washington, D.C. attorney Odell Kominers, who had represented Lykes in maritime matters

for years. (I SER 157, Kominers Depo. 3, 12, 143-44.) Kominers advised Lykes' president and chief executive, James Amoss, that MARAD's Subsidy Board had consistently taken the position that, as argued in the petitions, a hearing was "absolutely" necessary under the facts of this situation. (I SER 157, Kominers Depo. 159-60; II SER 374, Amoss Depo. 182-83, 335.) Amoss then spoke with APL's president, Bruce Seaton, and its executive vice president, Henry Kozlowski,[4] and agreed, subject to MARAD approval, to modify the January 2 Addendum to provide for notice and opportunity for hearing if, in the future, Lykes decided to put full containerships into the States service. (II SER 374, Amoss Depo. 199-204.)

After review and revision by counsel for APL and Lykes, and then by counsel for Sea-Land and U.S. Lines—the other parties entitled to notice—the proposed amendment was submitted to MARAD for its approval. The proposed amendment provided in pertinent part that "Lykes shall not enter containerships into service on Trade Route 29 or Trade Route 17 (Pacific), whether directly or as top-offs, nor be required to replace existing vessels with containerships for such service, without prior notice and opportunity for hearing under Section 605(c) of the Act." (II SER 374, Amoss Depo., Exh. 14.) APL

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[4] Petitioner's assertion that APL's "Kozlowski asked [Lykes'] Amoss to agree to not operate [*i.e.*, acquire] containerships" is absolutely false and shown to be false by the very testimony which petitioner cites. (Pet. 5.) That testimony establishes that the only restriction discussed was the one to which respondents were entitled by law—*i.e.*, that Lykes not introduce containerships into service without prior notice and opportunity for hearing under Section 605(c). (I SER 141, Kozlowski Depo. 177-80, 183-84.)

and U.S. Lines withdrew their petitions contingent upon the adoption by MARAD of the amendment. (II SER 374, Amoss Depo., Exhs. 14 and 17.)

5. *MARAD's Adoption of the Proposed Amendment.* MARAD's General Counsel at the time of the activity in question here testified that respondents were entitled to Section 605(c) notice and hearing before Lykes could introduce containerships into its Pacific service. (I SER 299, Exh. 2, Caras Depo. 50, 79-81.) Indeed, he had so informed Lykes' counsel after the January 2 Addendum had been issued. Acting in accordance with the opinion of its General Counsel that notice and opportunity for hearing were legally required, MARAD approved the proposed amendment. (I SER 299, Exh. 2, Caras Depo. 81; II SER 374, Amoss Depo., Exh. 24.)

6. *Lykes Was Not a Potential Bidder for the PFEL Ships.* In order to prevail on its petitioning claim, petitioner necessarily had to show that Lykes would have bid on the PFEL ships but for the MARAD activity. Recognizing this, petitioner claims that containerships were "the only vessels suitable for operation in [the Pacific Coast—Far East] trade." (Pet. 2.) Petitioner cites no evidence to support that claim. In any event, the view of anyone other than Lykes is irrelevant, and the record showed, without contradiction, that that is not how Lykes saw things.

More specifically, the record showed that Lykes' Amoss felt Lykes did not have the marketing ability, experience, or facilities to undertake a large containership operation, and he wanted to develop Lykes' West Coast business gradually, seeking only a toehold. (II SER 374,

Amoss Depo. 118-20, 312-13.) Moreover, Lykes not only lacked interest in the containerships, but lacked the money to buy them as well. In 1978, Lykes had been purchased by LTV Corporation. (I SER 157, Kominers Depo. 174-75.) LTV imposed strict financial controls on Lykes that prevented Lykes from making any substantial new financial commitment. (II SER 374, Amoss Depo. 140-42; I SER 157, Kominers Depo. 174-75.) Consequently, Lykes' president (Amoss), its senior vice president (Blocklin) and its counsel (Kominers, who was also a member of the Lykes management team) all testified that Lykes was not interested in acquiring the PFEL containerships, or any other containerships, at or before the time the PFEL ships were sold. (I ER 129, Amoss Decl. ¶¶ 2-3; I SER 157, Kominers Depo. 166-67, 174-75; III ER 389, App. N, Blocklin Depo. 110-11.)[5]

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[5] Petitioner implies that Lykes' vice president, Hans Blocklin, testified that, but for the Section 605(c) restriction, Lykes would probably have wanted to acquire containerships for use in the Pacific, possibly during 1979. (Pet. 7.) In fact, that is what Assigned's counsel wanted Blocklin to say, but Blocklin stated the opposite:

> Q. At the time that you agreed to Article 3 on January 29, 1979, and you read Article 3, it was your understanding that Lykes, because of that Article, would not be acquiring containerships absent notice and hearing?
>
> * * *
>
> THE WITNESS: One comes before the other. I don't think —you're making it, it seems to me—the way you pose the question, you're making it seem to me that the reason we're not going to obtain any containerships is because of that agreement.
>
> MR. APPEL: That's part of it.
>
> THE WITNESS: And that's not correct.
>
> MR. APPEL: That is not true?

(Continued on following page)

Notwithstanding this testimony from Lykes, petitioner claim that "in August, 1978, Lykes began to consider private purchase of one or more of the PFEL containerships then for sale." (Pet. 3.) To support this claim, petitioner cites the declaration of PFEL's then bankruptcy trustee, Benedict, which petitioner says shows that Lykes' Amoss "told the trustee that Lykes could potentially be interested in acquiring containerships in the future." (Pet. 3.) This turns the Benedict declaration inside out. Benedict stated that in August 1978, before the petitions were filed, he contacted Amoss in an effort to sell Lykes the PFEL ships; Amoss told him that "Lykes had neither the financial nor organizational resources to consider acquiring these vessels at that time." (I SER 307, Benedict Decl. 7.) Amoss told Benedict the same thing on January 22, 1979, after the petitions had been filed, when Benedict tried again to interest Amoss in the PFEL ships. Benedict was again told that Lykes had no interest because "Lykes still felt as [Amoss] had told [Benedict] previously that they were not ready to undertake a full blown container operation." (I SER 307, Benedict Decl. 10.)

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(Continued from previous page)

THE WITNESS: No. We were not interested in containerships. That's why that agreement wasn't that—it wasn't burdensome at the time.

By MR. APPEL: As of January 29, 1979?

A. Yes. Or '80, or '81 or '82.

(III ER 389, App. N, Blocklin Depo. 110-111.)

REASONS FOR DENYING THE WRIT

Petitioner fails to show any "special and important reasons" to grant the writ. (Rule 17.1.) Nowhere does the petition demonstrate that any legal standard employed by the decision conflicts with any standard employed by other circuit courts or this Court. Nor does the petitioner describe any important question of federal law which has not been, but should be, settled by the Court. Indeed, the petition does not identify any way in which the opinion below will affect federal jurisprudence in any respect at all.

In addition, the Court of Appeals was correct in its conclusion that petitioner failed to present substantial evidence to take the petitioning process out of the *Noerr-Pennington* doctrine. Although the Court of Appeals did not reach the question whether the judgment below was also supported by the uncontroverted evidence establishing lack of causation, that evidence provided an independent and additional ground for affirming the judgment.

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ARGUMENT

I. THE COURT OF APPEALS' APPLICATION OF THE NOERR-PENNINGTON DOCTRINE DID NOT CONFLICT WITH SOCONY-VACUUM

Petitioner claims that the Court of Appeals violated this Court's decision in *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940) ("*Socony-Vacuum*") by apply-

ing the *Noerr-Pennington* doctrine to a "private agreement among respondents and Lykes" arising from negotiations that occurred "prior to the filing of any petition." (Pet. 8-9.) The decision below did no such thing.

To begin with, there was no evidence at all of a "private agreement" originating prior to the petitions. Petitioner refers to testimony of Lykes' Amoss about contacts Amoss had with executives of APL, U.S. Lines and Sea-Land in December 1978, before any petitions were filed, but petitioner does not mention what was discussed among these individuals in December 1978. (Pet. 8.) Elsewhere, however, petitioner admits that "Amoss testified that containerships and/or containers hadn't so much as been mentioned during his December 1978 conferences with Seaton, Bru and Sea-Land." (Pet. 5.) That testimony stood uncontradicted.

As the Court of Appeals stated, the only agreement in the record between Lykes and the respondents was part of the "petitioning process." (Pet. A-9.) That agreement was a response to petitions "simply asking MARAD and Lykes to comply with the law." (Pet. A-10.) And the agreement simply provided that "subject to MARAD approval," the January 2 Addendum would be modified "to provide for notice and a hearing if, in the future, Lykes decided to put full containerships into service on State's Pacific trade routes." (Pet. A-9.)

As a matter of law, any amendment to the January 2 Addendum agreed upon by Lykes and the respondents had to be approved by MARAD, as a party to the Addendum (and the agency responsible for determining the terms of any subsidy), before the amendment could be-

come effective. Thus, as petitioner's second amended complaint admitted, the restriction which allegedly kept Lykes from bidding was not simply contained in a "private agreement"; it was adopted by MARAD in its agreement with Lykes. (I SER 55, ¶ 19; II SER 374, Amoss Depo., Exh. 24.)[6]

The Court of Appeals' application of the *Noerr-Pennington* doctrine on that record did not conflict with *Socony-Vacuum* in any respect. *Socony-Vacuum* (which was decided two decades before the *Noerr-Pennington* doctrine was born) concerned a naked price-fixing agreement for which no government approval was ever sought or formally granted. (310 U.S. at 226.) There is nothing in the Court's opinion to suggest that the *Noerr-Pennington* doctrine does not apply where, as here, (1) petitioners simply asked MARAD and Lykes (as the Court of Appeals said) "to comply with the law" (Pet. A-10); (2) Lykes agreed "subject to MARAD approval" to modify its agreement with MARAD to do so (Pet. A-9); and (3) MARAD approved the modification. That petitioning process was in the heartland of the *Noerr-Pennington* doctrine.

II. THE COURT OF APPEALS' APPLICATION OF THE NOERR-PENNINGTON DOCTRINE DID NOT CONFLICT WITH CARNATION

Petitioner also argues that there was no antitrust immunity because the Federal Maritime Commission (FMC)

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[6] Petitioner's assertion that "it is admitted by defendants that MARAD was acting as a 'passive pawn to private negotiations'" (Pet. 9) turns a letter written by APL's counsel inside-out. That letter said in substance that MARAD was not a "passive pawn to private negotiations" but was instead "a government agency taking whatever action it considers to be right."

is the only regulatory agency which has any power to exempt or immunize conduct engaged in by ocean shippers from the federal antitrust laws; the Shipping Act of 1916 (46 U.S.C. §§ 801 *et seq.*) specifies the procedure required to obtain that antitrust immunity; and respondents did not follow that procedure. All of this is said to flow from the Supreme Court's decision in *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213 (1966) (*"Carnation"*).

The FMC and the Shipping Act had nothing to do with this case. The restrictions which petitioner says kept Lykes from bidding resulted from petitions filed with MARAD, not the FMC; and the Shipping Act has nothing to do with MARAD subsidy matters. The antitrust immunity which respondents claim does not rest on the Shipping Act or any other statute. It rests on the *Noerr-Pennington* doctrine, which is based on the First Amendment.

Carnation is likewise irrelevant to this case. As petitioner admitted in the district court, the defendants in *Carnation* did not petition the FMC, or any other governmental agency, so that *Noerr-Pennington* immunity was not involved in that case. (Petitioner's 7/22/82 Memo, at 14-15, 18.) There is nothing in *Carnation* to suggest that *Noerr-Pennington* immunity, which rests on the First Amendment, is not available because a statutory immunity is not also available. Nor is there anything anywhere else in the law to support that absurd proposition.

III. THERE WAS AN ALTERNATIVE GROUND FOR AFFIRMING THE JUDGMENT BELOW

This Court has expressly held that an antitrust plaintiff must establish, as an essential element of its case,

that the alleged antitrust violation in fact caused it injury. *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 562 (1931).

As discussed above (pp. 9-11), the uncontradicted testimony in this case was that Lykes was not interested in acquiring the PFEL containerships because of limitations on its fiscal and organizational resources. That is what Lykes' executives said. That is what petitioner's assignor said. That uncontroverted testimony furnished another, independent reason why the judgment below was correct and had to be affirmed.

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CONCLUSION

The Petition does not present any of the "special and important reasons" required for the granting of review on writ of certiorari under Rule 17.1 and therefore should be denied.

Respectfully submitted,

Lasky, Haas, Cohler & Munter P.C.
Charles B. Cohler
Terry M. Gordon
505 Sansome Street
San Francisco, CA 94111
(415) 788-2700

Robert S. Zuckerman*
Sea-Land Service, Inc.
P. O. Box 800
Iselin, New Jersey 08830
(201) 632-2222

Counsel for Respondent Sea-Land Service, Inc.

Donovan Leisure Newton & Irvine
Sanford M. Litvack*
Vivian Polak
303 Rockefeller Plaza
New York, New York 10112
(212) 307-4100

Carr & Mussman
Timothy E. Carr
Lenell Topol
Three Embacardero Center
San Francisco, CA 94111
(415) 391-7112

Counsel for Respondent United States Lines, Inc.

McCutcheon, Doyle, Brown & Enersen
J. Thomas Rosch
John N. Hauser*
Brenda G. Woodson
Three Embarcadero Center
San Francisco, CA 94111
(415) 393-2000

Counsel for Respondent American President Lines, Ltd.

*Counsel of Record

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